Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IN THE MATTER OF

STEVEN M. KRAMER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS.

PETITION FOR A WRIT OF CERTIORARI.

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63P

QUESTIONS PRESENTED.

I. Has a state court violated the First Amendment by disbarring an attorney on the basis of a statement made to a newspaper reporter?

II. Has a state court violated the Due Process Clause by a requirement that an attorney can avoid disbarment only if he admits guilt through an expression of remorse while the attorney is still challenging the proceedings on due process grounds and was entitled to contest guilt?

III. Has a state court violated the Due Process Clause by disbarring an attorney without affording him an opportunity to be heard on the merits?

IV. Has a state court violated the Due Process Clause by raising numerous new charges/aggravating circumstances without prior notice and relying upon them to disbar an attorney?

V. Has a state court violated the Due Process Clause by disbarring an attorney for conduct not involving moral turpitude without a prior warning that such conduct could give rise to such punishment?

VI. May a state disbar an attorney based upon a preponderance of the evidence standard?

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United States Constitution
First Amendment i
Due Process Clause ..... i, 5, 8, 10, 11

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF FACTS.

In the fall of 1996 the Disciplinary Committee (Committee) of the New York Appellate Division Frist Department started an investigation of petitioner as a result of sanctions in *Selby* v. *Arms* [*Kramer* v. *Arms*], 1996 WL 131820 (S.D.N.Y. 1996), *affirmed*, 108 F.3d 329 (2d Cir.1997) . The subject was whether petitioner had made an

intentionally false statement to the court concerning the date and identity of a witness who had been deposed.[1]

On May 6, 1997 petitioner was suspended for six months by the Supreme Court of New Jersey. The basis for the suspension was a fee agreement that was found to have improperly given the petitioner proprietary interest in a law suit.[2]

On October 16, 1997, on the basis of that suspension, the Committee obtained an emergency order to show cause. Without a hearing, and applying collateral estoppel to the New Jersey order, The New York Appellate Division on that date issued an indefinite interim suspension. The Court ordered that petitioner was only entitled to a hearing on the form of punishment.

On May 18, 1998, the penalty hearing panel concluded:

> We were impressed with the [petitioner's] character witnesses. We have no doubt that [petitioner] is highly thought of by many, if not most of his clients and that he

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[1] Petitioner had mistakenly stated that his client's deposition had been completed on a certain date by telephone from Hawaii. In fact, on that date, it was the petitioner's expert witness who had given a deposition. The client's deposition had occurred on another date. As the panel itself found, petitioner's statement could not possibly have been made to intentionally mislead the court. (A. 43a).

[2] Petitioner had been retained by a debtor in bankruptcy to pursue an appeal of a breach of contract suit in the Ninth Circuit. Petitioner fully disclosed the fee agreement that included the challenged provision. The clause required the debtor to obtain petitioner's concurrence before entering into any settlement. Petitioner had insisted on this clause to prevent the debtor from entering into a settlement that favored him over the creditors.

> leaves them with the correct impression that he is fighting for their cause.

(Emphasis added.) (A. 10a).

The Committee rejected the prosecutor's charge that the petitioner had intentionally misled a court:

> Certainly, the cases cited to us other than [In the Matter of] Mason involved false testimony, *which we have not found here.* We ascribe the falsity of Respondent's assertions *more to carelessness* than to venality, more to a practice of perceived certainty than to deliberate falseness.

(Emphasis added.) (A. 43a).

The Committee then proceeded to 'reluctantly' recommend disbarment on the basis of what it believed to be the controlling authority (the *Mason* case) in New York. It stated that otherwise it would have only recommended a suspension. The panel relied in substantial part on a comment made by petitioner to a reporter a year prior to the start of the investigation. (A. 45a). On September 24, 1998, the Appellate Division emphasizing that interview confirmed the recommendation. *Id.* On April 1, 1999 the NY Court of Appeals denied petitioner's petition for leave to appeal. (A. 1a).

As a result of the New York disbarment, reciprocal disbarment orders without hearing have been entered in the other jurisdictions in which petitioner had been licensed. A similar order is being considered by this Court. In 24 years of

practice, petitioner has never been found to have engaged in an act of moral turpitude. See p. 6, n.4.

REASONS WHY THE PETITION SHOULD BE GRANTED.

I. THE STATE MAY NOT DISBAR AN ATTORNEY ON THE BASIS OF A STATEMENT TO THE PRESS WHERE THE STATEMENT HAD NO POSSIBILITY OF IMPACTING AN ONGOING PROCEEDING.

This Court held in *In re Snyder*, 472 U.S. 634; 105 S. Ct. 2874 (1985)) that an attorney may not be suspended for criticizing a court where there is no likelihood of prejudicing a trial. See also, *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030 (1991). The New York order clearly conflicts with those decisions. Petitioner told a reporter a year before the disciplinary investigation started that certain court rulings in which the petitioner had been criticized or sanctioned involved conduct that was "chicken shit". (A. 45a). The New York court cited that as grounds for disbarment. (A. 6a):

> The panel also considered an article in Lawyers' Weekly USA in which respondent was quoted as referring to the findings of his numerous ethical violations as 'for chicken-shit stuff'. In this article he compared himself to a superstar athlete who is willing to risk breaking the rules although he is sometimes penalized, sanctions were just a necessary cost of playing the game zealously. Respondent stood by these statements when questioned at

> the disciplinary hearing, and expressed his belief that his criticized conduct was 'part of being a tough litigator'.[3]

II. THE STATE COURT VIOLATED THE DUE PROCESS CLAUSE BY DISBARRING PETITIONER FOR REFUSING TO ADMIT GUILT THROUGH AN EXPRESSION OF REMORSE WHILE HE WAS STILL CHALLENGING THE PROCEEDINGS ON DUE PROCESS GROUNDS.

A state may not deprive a person of his or her livelihood for refusing to waive his constitutional rights. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Boyd* v. U.S., 116 U.S. 616 (1886); *Gardner* v. *Broderick*, 392 U.S. 273 (1968). This Court in *Spevack* v. *Klein*, 385 U.S. 511, 516 (1967) held that a state may not disbar an attorney based upon his refusal to waive his constitutional rights:

> The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion.

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[3] The actual comment and context from the interview, (A. 45a), was :

> The firms I'm up against . . . [woul]d just as soon ruin me as have a cup of coffee. If I'M a shrinking violet, they'll walk all over me . . . The findings were for chicken-shit stuff . . . You'll never find sanctions saying I destroyed documents or pressured witnesses to falsify documents . . .

See also, *Van Sloten* v. *State Bar*, (1989) 48 Cal.3d 921, 932-933 (attorney may not be disciplined for failure to admit guilt); *California Bankers Assoc.* v. *Shultz*, 416 U.S. 21, 29 (1974).

The New York court held that the comment, even though made a year before the disciplinary investigation even started, showed a lack of remorse. The court disregarded the fact that the petitioner was challenging the proceedings on numerous constitutional grounds as described in this petition and was still contesting guilt.

III. THE STATE COURT BASED DISBARMENT ON CONDUCT NOT PREVIOUSLY DEEMED SUFFICIENT FOR DISCIPLINE LET ALONE DISBARMENT.

In addition to the petitioner's comment to the press, the New York court based disbarment on a finding that the petitioner had, in the words of the Disciplinary Committee panel, "pushed the envelope" in prosecuting cases. (A. 42a). There was no evidence of any moral turpitude. No ruling or warning existed that would have put petitioner — or any other attorney — on notice that "pushing the envelope" could result in disbarment. None of the conduct involved acts of moral turpitude; witness tampering, destruction of documents, theft of funds, abandonment of a client, attempts to improperly influence a judge or jury, perjury or intentionally false statements.[4] Therefore, the disbarment order flatly conflicts with the rulings of this Court:

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[4] The NY disciplinary panel explained that the term "'pushing the envelope' referred to petitioner's prosecution of litigation. Petitioner, in 24 years of practice, had actually been sanctioned in no more than ten cases

> A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the court would condemn the conduct for which he was removed. I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct.

In re Ruffalo, 390 U.S. at 556 (1968) (White, J. concurring).

This Court approved of Justice White's reasoning in *Zauderer* v. *Office of Disc. Counsel*, 471 U.S. 626, 653 (1985):

> [a] relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed.
>
> *In re Ruffalo*, 390 U.S. 544, 554, 88 S. Ct. 1222, 1228, 20 L.Ed.2d 117 (1968) (WHITE,

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out of over 1,000, which averages out to one non-venal sanction every 2 ½ years of petitioner's career. (A. 42a). Many a reasonable trial attorney would not know that "pushing the envelope" without venality could result in suspension, let alone disbarment.

> J., concurring in result), it may well be that for Ohio actually to disbar an attorney on the basis of its disclosure requirements as they have been worked out to this point would raise significant due process concerns.

Accord, *Dailey* v. *Vought Air Co.*, 141 F.3d 224 (5th Cir. 1998) (reversing disbarment for failure to provide notice of charges and opportunity to be heard); *Schlumberger Tech.* v. *Wiley*, 113 F.3d 1553 (11th Cir.1997) (reversing refusal to admit attorney); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir. 1990) (reversing suspension: "In examining the district court's order of suspension, the relevant inquiry is whether the attorney can be deemed to have been on notice that the courts would condemn the conduct for which he was sanctioned. This would necessarily include behavior which responsible attorneys would recognize as improper for a member of the profession"; *In re Polypropylene Antitrust Litigation*, 1998 WL 513, 990, 19 (N.D. Ga.1998)).

IV. THE STATE COURT DEPRIVED PETITIONER OF DUE PROCESS BY NOT GIVING HIM A CHANCE TO BE HEARD ON THE MERITS.

The court held that petitioner was not entitled to be heard on the merits. (A. 3a, 8a). This violated the Due Process Clause. *Selling* v. *Radford*, 243 U.S. 46, 51; *Matter of Jacobs*, 44 F.3d 84, 90 (2d Cir.1994). The Fifth Circuit explained recently in reversing a disbarment where the attorney was deprived of an opportunity to be heard on the merits examined this Court's decisions:

> Prior to an attorney's disbarment, he or she is entitled to notice of the charges, made an opportunity to explain or defend . . . *Ruffalo* [*supra*]. This principle has been clearly and consistently expressed by the Supreme Court. *Theard* v. *U.S.*, 354 U.S. 278, 282 . . . (1957) ('Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred.'); *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 511 . . . (1873) ('Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and an ample opportunity of explanation and defence.'); *Ex Parte Garland*, 71 U.S. (32 How.) 333, 378 . . . (1866) ('They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.'); see also, *Burkett* v. *Chandler*, 505 F2d 217, 222 n.5 (10th Cir.1974), *cert. denied*, 423 U.S. 876 . . . (1975) (disbarment proceeding void due to absence of prior notice or opportunity to be heard . . .).

Dailey v. *Vought Air Co.*, 141 F.3d 224 (5th Cir. 1998).

V. ADDING ADDITIONAL CHARGES/AGGRAVATING CIRCUMSTANCES WITHOUT PRIOR NOTICE VIOLATED DUE PROCESS CLAUSE.

Petitioner was bombarded with from seventeen to twenty five new charges [or aggravating circumstances] in the middle of the penalty hearing without prior notice. The original and only petition for discipline was based on the New Jersey suspension and the sanctions imposed in *Selby*. Nevertheless, the prosecutor added from seventeen to twenty four new charges under the guise of aggravating circumstances without prior notice. This is completely inconsistent with *In re Ruffalo*, 390 U.S. 544 (1968):

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge. Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.' *Selling* v. *Radford*, 243 U.S. 46, 51. In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal

> litigation.' These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence. 390 U.S. at 550-51 (emphasis added). Accord, *Matter of Abrams*, 521 F.2d 1094, 1104-1105 (3d Cir. 1975) (*en banc*) (reversing disbarment because lower court did not advise attorney that it was considering additional charges).

See also, *Common Prof. Ethics Etc.* v. *Johnson*, 447 F.2d 169, 172-173 (3d Cir. 1971) (same).

VI. THE STATE COURT'S USE OF A PREPONDERANCE OF THE EVIDENCE STANDARD TO DISBAR AN ATTORNEY VIOLATES THE DUE PROCESS CLAUSE.

New York applies a preponderance of the evidence standard in attorney disciplinary matters. *Matter of Capoccia*, 59 N.Y.2d 549, 453 N.E.2d 497 (1983). The ruinous nature and stigma of disbarment requires, under the Due Process Clause, that a clear and convincing evidence standard be used. This is not simply the removal of a business license. It is far from the type of decision that requires only a rational basis. A person's reputation, professional life and family life should not be destroyed so easily, particularly here where there was no suggestion of moral turpitude. It is a scarlett letter that cannot be removed. It is worse, in some ways, than a felony record. A disbarred attorney cannot hope to get a teaching job or any other job of trust. Before that draconian measure is taken, a standard more strict than that which governs fender

benders should be used. This Court's decisions support that conclusion. *Cruzan by Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261, 110 S.Ct. 2841 (1990). This Court has held that disbarment proceedings are quasi criminal in nature. *In re Ruffalo*, 390 U.S. 544 (1968). ("These are adversary proceedings of a quasi-criminal nature"); *Selling* v. *Radford*, 243 U.S. 46, 51. Every federal court who has addressed the issue has held that federal disbarment cannot take place without satisfying the clear and convincing evidence standard. *In re Crayton*, 192 B.R. 970 (9th Cir.1996); *In re Medrano*, 956 F.2d 101, 102 (5th Cir.1992).

The arbitrary nature of the state court's order here also supports a requirement that the clear and convincing standard be applied. As noted, never before in the history of New York disbarment proceedings has an attorney been disbarred for conduct that did not involve an act of moral turpitude. The only accusation of such conduct was flatly rejected by the disciplinary committee panel. See page 1, n. 1, *supra*. Petitioner's career should not be destroyed in such a cavalier, arbitrary, and unconstitutional manner.

CONCLUSION.

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX A.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of April 1999

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-24 Mo. No. 294
In the Matter of Steven M. Kramer (Admitted as Steven Michael Kramer), a disbarred attorney:

Departmental Disciplinary Committee for the First Judicial Department,
Respondent,

Steven M. Kramer,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the October 16, 1997 Appellate Division order, be and the same hereby is dismissed upon the ground

that it does not lie, appellant having previously moved in this Court for leave to appeal (91 NY2d 805) from the same Appellate Division order from which he currently seeks leave to appeal (see, Selinger v Selinger, 90 NY2d 842); and it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the Appellate Division order of disbarment, be and the same hereby is denied.

/s/
Stuart M. Cohen
Clerk of the Court

APPENDIX B.

SUPREME COURT, APPELLATE DIVISION

First Department, August 1998

Joseph P. Sullivan, Justice Presiding
Ernst H. Rosenberger
Richard W. Wallach
Milton L. Williams
Angela M. Mazzarelli, Justices

---x

In the Matter of Steven M. Kramer
(admitted as Steven Michael Kramer),
a suspended attorney:

Departmental Disciplinary Committee
for the First Judicial Department,
Petitioner, M-4072

Steven M. Kramer,
Respondent.

---x

Disciplinary proceedings instituted by the Departmental

Disciplinary Committee for the First Judicial Department. Respondent was admitted to the Bar as Steven Michael Kramer, at a Term of the Appellate Division of the Supreme Court for the Third Judicial Department, on December 18, 1984.

Richard Supple, of counsel (Thomas J. Cahill, Chief Counsel), for petitioner

Steven Kramer, of counsel (Steven Kramer & Associates, attorneys), for respondent.

M-4072
August 3, 1998

In the Matter of Steven M. Kramer, a Suspended Attorney

PER CURIAM

Respondent Steven M. Kramer was admitted to the practice of law in the State of New York by the Third Judicial Department on December 18, 1984 as Steven Michael Kramer. Respondent was admitted to the New Jersey Bar in 1983. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

Over the past 11 years, respondent has been sanctioned, criticized, or otherwise disciplined 38 times for professional misconduct involving numerous clients (see Kramer v Tribe, 156 FRD 96 [D NJ] [citing cases], affd 52 F3d 315 [3d Cir], cert denied 516 US 907). In our decision dated October 16, 1997 (Matter of Kramer, 235 AD2d 87, lv denied 91 NY2d 805), we temporarily suspended respondent from the practice of law and referred the matter back to the Departmental Disciplinary Committee for consideration of aggravating and mitigating factors and recommendation of the appropriate sanction. The Committee now moves for an order pursuant to 22 NYCRR 603.4(d) confirming the Hearing Panel's findings and its recommendation that respondent be disbarred.

The facts giving rise to respondent's suspension are outlined in more detail in our previous decision (id. at 88-90). In

connection with his representation of Helen Selby before the United States District Court for the Southern District of New York, respondent was sanctioned for willful disobedience of discovery orders, as well as for making false statements in affidavits. He also refused to accept being dismissed by his client, and went so far as to file an unauthorized appeal and a subsequent petition for rehearing on her behalf.

This pattern of resistance to a client's wishes was repeated during his representation of Jon E. DeLuca in New Jersey. Several times, respondent prevailed upon his ailing client to allow respondent to continue to litigate a weak case instead of accepting the other side's settlement offer. Once again, even after being relieved as counsel, respondent tried to block the parties' efforts to settle.

In determining whether to recommend disbarment, the Hearing Panel considered the recent misconduct described above, plus numerous other past instances of respondent's deliberate noncompliance with discovery orders and his contempt for the ethical rules of his profession. An abbreviated survey of respondent's long history of official reprimands reveals a whole repertoire of habitual misdeeds: refusing to cease acting on behalf on a client who has dismissed him (e.g., Matter of Kramer, 193 AD2d 222); flagrantly violating discovery orders (e.g., International Mining Co. v Allen & Co., 567 F Supp 777, 789-90 [SD NY]); filing frivolous claims (e.g., LeMaster v Bull, 581 F Supp 1170, 1173 [ED Pa]; Giordano v Witzer, 558 F Supp 1261, 1262 [ED Pa]); and making false statements to the court (e.g., Silverman v. Weil, 662 F Supp 1195, 1201 [D DC], affd 839 F2d 824 [DC Cir]; Rubin v. Buckman, 727 F2d 71, 72 [3d Cir]). The above citations are by no means a comprehensive list of the occasions on which respondent has been called to task for employing such tactics.

At the hearing before the Committee, as mitigating evidence, respondent presented eight character witnesses, seven of whom were former clients. While those witnesses spoke highly of respondent, the Hearing Panel also took into account the fact that the witnesses were unaware of the formal charges in this proceeding. The Panel refused to rely on a polygraph test purporting to contravene the Southern District's finding that he had lied about certain discovery issues in the Selby matter, as this court had already ruled that respondent was collaterally estopped from challenging the District Court's finding (Matter of Kramer, supra, 235 AD2d at 89).

Aggravating factors included the frequency of respondent's misconduct, and the fact that notwithstanding repeated reprimands for the same behavior, he persisted in using these tactics in subsequent lawsuits. The Panel also considered an article in Lawyer's Weekly USA in which respondent was quoted as referring to the findings of his numerous ethical violations as "for chicken-shit stuff." In this article, he compared himself to a superstar athlete who is willing to risk breaking the rules although he is sometimes penalized: sanctions were just a necessary cost of playing the game zealously. Respondent stood by these statements when questioned at the disciplinary hearing, and expressed his belief that his criticized conduct was simply "part of being a tough litigator."

Overall, the evidence presented at the hearing demonstrates that respondent has shown neither remorse nor self-control. Neither the public censure and private reprimand nor the temporary suspension he received from this court, nor the public reprimand from the Supreme Court of New Jersey, have deterred his misconduct. He appears unable to appreciate the magnitude of the harm he causes to his clients and to

the courts before which he practices. Disbarment is certainly warranted where the respondent's pattern of ethical violations covers such a wide range of cases over several years (Matter of Evangelista, 233 AD2d 1, 3), especially since that pattern is likely to continue due to respondent's evident imperviousness to sanctions and his indifference to the consequences of his actions (Matter of Mason, 208 AD2d 1, 36, recons dismissed 216 AD2d 89).

Accordingly, the Committee's petition is granted, the Hearing Panel's findings of fact and conclusions of law are confirmed, and the respondent is disbarred with his name to be stricken from the roll of attorneys forthwith.

All concur.

Order filed.

APPENDIX C.

BEFORE THE DEPARTMENT DISCIPLINARY COMMITTEE OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

		HP No. 43/97
In the Matter of	:	
		Before a Hearing Panel
Steven M. Kramer, Esq.	:	Consisting of:
Respondent	:	Otto G. Obermaier, Esq. Hearing Panel Chair
	:	Justin Feldman, Esq.
		Oliver A. Smith, Esq.
		Alfred G. Gerosa

REPORT OF THE HEARING PANEL

In its Decision and Order, Matter of Kramer, 235 A.D.2d 87, 664 N.Y.S.2d 1 (1st Dept. 1997), (Panel Exhibit ("PX") 1), the Appellate Division granted two separate petitions of the Departmental Disciplinary Committee and suspended Respondent on an interim basis pursuant to 22 N.Y.C.R.R. §§ 603.3 and 603.4 (e) (1) (iii) .

The matter was remanded to the Committee and by the latter to this Panel for the purpose of holding a Hearing "solely to consider evidence in mitigation or aggravation, if any, and to recommend the appropriate sanctions". (Order, October 16, 1997)

Hearings were held on December 17, 1997 and January 6, 1998. Post-hearing submissions were received from the Staff on February 10, 1998. Respondent made no formal post-hearing submissions.

As to one of the Committee's petitions, the Appellate Division on the basis of collateral estoppel found Respondent guilty of professional misconduct by virtue of the findings by United States District Judges for the Southern District of New York Patterson and Cote, in Selby v. Arms, 93 Civ. 6481 (DLC) and the United States Court of Appeals for the Second Circuit in Kramer v. Arms, 108 F.3d 329 (2d Cir. 1997) (hereinafter collectively "Selby"). As to the second of the Committee's petitions involving a New Jersey case, DeLuca v. Koala Blue (hereinafter "DeLuca"), the Appellate Division ordered reciprocal discipline against Respondent pursuant to 22 N.Y.C.R.R. § 603.3 after the New Jersey Supreme Court suspended Respondent for six (6) months. The Appellate Division noted that it would normally impose the same discipline New Jersey had, but in view of the Selby matter for the sake of Judicial efficiency it ordered the Committee, and thus this Panel, to consider the appropriate sanction for both the DeLuca and Selby matters.

The Evidence in Mitigation

Respondent called 8 character witnesses, all but one in person (Respondent's Exhibit ("RX") B). Seven of the character witnesses were former clients of Respondent's who spoke highly of his dedication and competence. The other character witness, Leona Guy, spoke equally highly of Respondent, was a personal friend, his daughter's teacher, and for whom Respondent provided some advice and representation without fee.

We were impressed with the character witnesses. We have no doubt that Respondent is highly thought of by many, if not most of his clients and that he leaves them with the correct impression that he is fighting for their cause. The issue here is principally how he litigates for his clients. All of the witnesses knew nothing of the formal charges in these proceedings, and several specifically testified that the findings in Selby would not alter their opinion of Respondent. We credit their testimony and Respondent's own (Tr. 216) that knowledge of the Selby findings would not have altered their opinion of Respondent.

Respondent himself testified. He did not dispute the sanctions in the other matters but did challenge a portion of the Lightning Lube v. Witco case. Respondent produced a portion of a news article reporting an opinion of District Judge Barry in the United States District Court for the District of New Jersey finding that Respondent did not "tamper" with witnesses during the course of that case.

The article (RX D) from the New Jersey Law Journal is not complete. The Staff agreed that there was no finding by any disciplinary group in New Jersey that Respondent engaged in witness tampering (Tr. 163). Although Respondent was given two weeks to provide any additional information, he did not. Nevertheless, we do not give any credence to a claim that Respondent engaged in witness tampering in Lightning Lube litigation.

Respondent also challenged Judge Cote's finding that he lied concerning the completion of certain depositions in Selby. Respondent argues that it made no sense to prevaricate over a fact or facts so easily ascertainable. However, Judge Cote's Opinion and Order of December 19, 1995 finds that Respondent falsely stated a series of facts, not solely the

completion of the depositions. The relevant portions of her Opinion and Order follow:

> "Mr. Kramer also submitted his own affidavit in opposition to the motion, in which he makes several false statements. He asserts that the plaintiff's deposition was "taken and completed on September 30, 1994." This statement was repeated three times in Mr. Kramer's affidavit. In fact, plaintiff was only deposed once, on January 20, 1994. Her deposition was to be completed after the production of outstanding discovery materials, but those discovery materials were never produced and the deposition was never completed. After the motion to dismiss was fully submitted and months after the close of discovery, Mr. Kramer wrote to advise defense counsel that plaintiff was now available to complete her deposition.
>
> Mr. Kramer also falsely states that his own deposition was completed on October 20, 1994, and that defense counsel acknowledged so on the deposition transcript. In fact, as the deposition transcript reflects, the deposition session, which lasted something over an hour, ended at Mr. Kramer's request because he claimed that he was "fading." Defense counsel estimated that he had an hour more of questions and asked Mr. Kramer to advise him at his first opportunity for a date on which the deposition could be completed. Mr.

Kramer never made himself available for the completion of his deposition and no further session was ever held.

Mr. Kramer also falsely states that all IRS authorization forms that had been requested had been provided. The IRS requires recently executed forms with original signatures and a current address, as plaintiff's counsel was advised in December 1994. Plaintiff never provided such authorization forms.

Mr. Kramer also falsely asserts that he provided defendants' counsel with all authorizations that had been requested. It appears that the plaintiff executed authorizations for release of records by her accountants and therapists on October 26, 1994, and provided them to Mr. Kramer. Mr. Kramer never provided the therapist authorizations to defense counsel, did not send them to the therapists until February 1995 at the earliest, and did not inform defense counsel that they had ever been executed until he attached them as exhibits to his affidavit in opposition to the motion to dismiss. Defense counsel had written four letters between November 1994 and January 1995 inquiring about the therapist authorizations.

Finally, Mr. Kramer falsely asserts that plaintiff served "full and complete interrogatory answers on May 26, 1994, [and] defense

counsel has pointed to no deficiency in those answers." The answers served on May 26, 1994, almost a month after Judge Patterson's order them to be served, were unsworn and signed only by the attorney for the plaintiff. By letter dated May 27, 1994, defense counsel enumerated several deficiencies in the May 26, 1994, interrogatories, including the omission of plaintiff's signature and the failure to respond to questions. At the July 7, 1994, conference, Judge Patterson ordered plaintiff to serve by July 15, 1994, interrogatory answers in one complete document signed by plaintiff and in the form required under the Federal Rules of Civil Procedure. On July 18, 1994, plaintiff served two separate documents, which were unsigned by plaintiff. On September 6, 1994, plaintiff provided a document entitled Verification of Plaintiff's Interrogatory Answers. To date, interrogatory answers that comply with Judge Patterson's July 7, 1994, Order and the Federal Rules of Civil Procedure have not been served."

Opinion and Order at 13-14.

* * *

"***In response to the motion to dismiss, Mr. Kramer repeatedly misrepresented the history of discovery in this case in an effort to deceive the Court regarding his and his client's

> failure to comply with virtually every Court Order issued in this case." (id at 17)

Judge Cote also found that "plaintiff and her attorney have willfully failed to comply with legitimate discovery demands in violation of Court Orders issued on November 19, 1993 (setting original discovery schedule), April 28, 1994, April 29, 1994, July 7, 1994, October 14, 1994, and November 10, 1994, resulting in substantial and irreparable prejudice to the defendants." Opinion and Order at 16.

She also found:

> "*** The conduct of the plaintiff and her counsel, which as detailed above, consisted of persistent and unexcused disregard of Judge Patterson's and this Court's discovery Orders, can only be characterized as willful and reflecting their disregard to "the integrity of the discovery process and, indeed, the integrity of the Court."

id at 19 (citation omitted) and

> "***With respect to Mr. Kramer's own culpability, his false statements to the Court alone would justify monetary sanctions against him." (id at 21)

Respondent's testimonial defense appears to address only a portion of Judge Cote's findings of Respondent's improprieties.

We took under advisement the results of a polygraph examination conducted of Respondent by Daniel J. McBride.

The polygraph examination was directed to the question as to whether or not Respondent "knowingly and intentionally misled Judge Cote in the Selby matter. The opinion was that he was truthful when he denied having done so.

We took the polygrapher's testimony over the objection of the staff and their citation to People v. Scott, 68 N.Y.2d 888, 891 (1996) and Matter of Jeffrey Lassoff, 231 A.D.2d 229, 659 N.Y.S.2d 254 (1st Dept., 1997). Our reasoning was that the admissibility of polygraph evidence was then before the United Sates Supreme Court. On March 31, 1998, the Supreme Court upheld a Military Rule of Evidence ban on all polygraph evidence as consistent with the Constitution. United States v. Scheffer, 118 S.Ct. 1261 (1998). Although Respondent's proffer here was for a more limited purpose and we would ordinarily be persuaded by such testimony as bearing upon intent, we believe in this instance our reliance upon such evidence would contravene the current state of New York law, go beyond our mandate of recommending an appropriate sanction, and challenge the validity of Judge Cote's determination that Respondent intentionally misled her in Selby as to which Respondent is collaterally estopped.

During Respondent's testimony, he maintained that he notified Judge Cote in the Selby matter that he had erred in one of the statements which the Judge found untrue. He said that he was certain that he had notified the Judge of his error. Respondent represented that he would produce the letter in which he notified Judge Cote. No such letter was produced although Respondent was given two weeks from the conclusion of the Hearing to produce it. We can only conclude that no such letter exists. We give the Respondent the benefit of the doubt that he did not intentionally misrepresent to the Panel the existence of this letter.

Respondent was cross-examined about an interview he gave reported in Lawyer's Weekly USA (Staff Exhibit ("SX") 4). Respondent does not deny the accuracy of a quote attributed to him that the findings made in the cases in which he was sanctioned were for "chicken shit stuff" and that he analogized his ethical behavior to that of Charles Barclay, apparently a professional basketball player who is on occasions ejected from games. Respondent says his conduct is "part of being a tough litigator." (Tr. 201). Respondent explained his view of his sanctioned conduct:

> "But as you're playing rough and trying to win a case, sure, you might file an interrogatory answer late. or in your zeal to win your case, you might give an improper summation." (Tr. 210)

Respondent relies extensively on the distinction which he articulated:

> "You'll never find sanctions saying I destroyed documents or pressured witnesses to falsify documents. You'll never find sanctions saying I conspired with my client." (Tr. 203)

In the latter he is correct; but both his prior statements and his explanations of them lack even the hint of remorse.

We reject the Staff's contention that Respondent lied about changing his stationery following his suspension in New Jersey. Through an apparent glitch in the regulatory system, suspension by a State does not automatically result in suspension in the Federal courts of that State. It is on this

distinction that Respondent relies to explain his stationery. (Tr. 195-97).

In sum, we are struck by the similarity between Respondent's defense of himself in these proceedings with his conduct in the representation of others; he makes representation of fact which appear to be unfounded or not followed up, in this case the so-called notification to Judge Cote of at least one error in his affidavit; he fails to complete professional obligations timely, in this case the failure to provide the promised additional exhibits and the failure to submit post-hearing findings putting yet an additional burden on the Panel.

Respondent's Prior Disciplinary History

Respondent has previously received a public censure and a private reprimand from the Appellate Division and a public reprimand from the Supreme Court of New Jersey.

In Matter of Kramer, 193 A.D.2d 222 (1st Dept. 1993), Respondent was censured on the basis of a reciprocal discipline matter from New Jersey. Respondent represented a father and daughter in a New Jersey action but was disqualified pursuant to a Court Order. Nevertheless, Respondent continued to act for his clients despite the disqualification order. The New Jersey Court also found this distinction that Respondent relies to explain his stationery. (Tr. 195-97).

In sum, we are struck by the similarity between Respondent's defense of himself in these proceedings with his conduct in the representation of others; he makes representation of fact which appear to be unfounded or not followed up, in this case the so-called notification to Judge Cote of at least one error in his affidavit; he fails to complete professional obligations timely, in this case the failure to provide

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The New Jersey public reprimand appears at In the Matter of Steven M. Kramer, 130 N.J. 536, 617 A.2d 663, 1993 N.J. Lexis 10 (1993).

Respondent's private reprimand also arose from a reciprocal disciplinary matter. It involved an appeal to the United States Court of Appeals for the Third Circuit. Respondent inserted a Brief in the appellate record that was not part of the record below. The Third Circuit accepted Respondent's claim that his misconduct was negligent. Its report, however, found that Respondent failed to acknowledge that the brief in question had not been filed with the District Court, even though his adversary had brought that fact to Respondent's attention. (SX 2C).

Prior Judicial Sanctions, Criticisms and Admonitions

The Staff relies upon 13 reported opinions in which Respondent was sanctioned, criticized or admonished in various litigations. They are collected as Panel Exhibit ("PX") 30. The prior instances are:

- Hansel v. Shell Oil Co., 169 F.R.D. 303 (E.D. Pa. 1996);

- Kramer v. Tribe, 156 F.R.D. 96 (D.N.J. 1994) aff'd, 52 F.3d 315 (3rd Cir. 1995), cert. denied, 516 U.S. 907 (1995); Respondent was sanctioned for attempting to extort a legal fee by making statements to the press that were calculated to prejudice an ongoing court proceeding;

- Vangarelli v. Witco, 808 F.Supp. 387 (D.N.J. 1992);

- Fineman v. Armstrong, 774 F.Supp. 266 (D.N.J. 1991); aff'd in part and rev'd in part; 980 F.2d 171 (3rd Cir. 1992);

- Matthews v. Freedman, 128 F.R.D. 194 (D.D.Pa. 1989); aff'd, 919 F.2d 135 (3rd Cir. 1990)

- Seifert v. Green, 1987 WL 13739 (E.D.Pa. 1987);

- International Mining Co. v. Allen, 567 F.Supp. 777 (S.D.N.Y. 1987);

- In re E.F. Hutton Banking Practices Litigation, 663 F.Supp. 123 (S.D.N.Y. 1987);

- Silverman v. Weil, 662 F. Supp. 1195 (D.D.C. 1987); aff'd, 839 F.2d 824 (D.C. Cir. 1988)

- Kravinsky v. Wolk, 1988 WL 84748 (E.D.Pa. 1988); aff'd, 869 F.2d 589 (3rd Cir. 1989);

- Schwartz v. Hospital of the Univ. of Pennsylvania, 1989 WL 64286 (E.D.Pa. 1989)

- Getaway Travel v. City of Philadelphia, 1989 WL 24859 (E.D.Pa. 1989); and

- Astron Venture Corp. v. Nationwide Lending Co., 1989 WL 35414 (E.D.Pa. 1989).

The Panel's Assessment of
The Prior Sanctions, Criticisms and Admonitions

These 13 instances are not of equal gravity. The following is our prioritization of them in descending order of seriousness. We rely solely upon the reported opinions, either in the West Reporter system or LEXIS.

Kramer v. Tribe (1994)

This was a lawsuit initiated by Respondent against appellate counsel for the same client, Lightning Lube, concerning

access to the proceeds of a judgment filed with the court by the defendant in the underlying litigation. Respondent sued Laurence Tribe, appellate counsel and a professor at the Harvard Law School. An Amended Complaint added three individual defendants also at the Harvard Law School. Kramer himself had a fee dispute with Lightning Lube and its principal which was settled with a provision that Respondent would receive 25% or any amount appellate's counsel fee was reduced from $2.75 million. The suite against Tribe followed.

The District Court dismissed Kramer's Complaint on an alternate basis of his conduct of the litigation, referred the matter to the Chief Judge of the Federal District Court of New Jersey, to the Office of Attorney Ethics for the State of New Jersey for disciplinary proceedings, referred possible violations of State and Federal criminal laws to the United States Attorneys for both the Southern District of New York and the District of New Jersey, and ordered Kramer to pay some of the defendants $70,289.00 for their attorneys fees and costs. 156 F.R.D. at 111.

Respondent's sanctionable conduct including threatening lawsuits and unfavorable publicity if appellate counsel did not reduce their fees to $600,000. Respondent threatened to go "to the press and ruin Mr. Tribe's reputation and provide damaging information about Professor Tribe to Senator Hatch." 156 F.R.D. at 102. Kramer carried out at least a portion of the threat by sending copies of his Complaint to newspapers and journals. Articles appeared in the Harvard Crimson, Harvard Law Record, Wall Street Journal and New Jersey Law Journal. 156 F.R.D. at 103.

In the course of its Opinion, the Court summarized 36 publicly reported instances of Respondent's violations of rules of professional conduct. We reprint here the court's

recitation, although there is repetition of the 13 individual cases we analyze below, 156 F.R.D. at 104-109:

> "(1) In Giordano v. Witzer, 558 F. Supp. 1261, 1262 (E.D. Pa. 1983), the plaintiff, who was represented by Kramer, had his Complaint dismissed. Chief Judge Luongo opined that: "The pleadings in this case are, to say the least, frightful. In excess of one hundred pages of exhibits are appended to the amended complaint. Included in this morass of paper are the agreement of sale for Seller's assets and the supporting documentation." Id. at 1262. The court concluded that the agreement clearly demonstrated the parties, desire to litigate any disputes over the agreement in the Court of Common Pleas for Delaware County, rather than a federal district court, and dismissed the amended complaint accordingly.
>
> (2) In International Mining Co. v. Allen & Co., 567 F. Supp. 777, 789-90 (S.D.N.Y. 1983), Judge Sweet dismissed international Mining Company's ("IMCO's"), Complaint under Federal Rule of Civil Procedure 37(b)(2)(C), for failure to respond to discovery. Kramer was IMCO's counsel. In making his ruling, Judge Sweet stated that:
>
> > "IMCO's complete failure to produce documents, after representation of its counsel in open court that production was forthcoming, can only be described as willful and shows its disrespect not only for its discovery obligations, but also for this court. Its intransigence in supplying adequate answers to Allen's in-

terrogatories rises at least to the level of gross negligence." Id. at 789.

(3) In LeMaster v. Bull, 581 F. Supp. 1170, 1173 (E.D. Pa. 1984), the Honorable Louis H. Pollack, U.S.D.J., assessed attorney's fees under 15 U.S.C. § 77k against defendants represented by Kramer, due to the clear lack of merit and frivolous nature of the defenses raised."

(4) In Rubin v. Buckman, 727 F.2d 71, 72 (3d Cir. 1984), the Third Circuit vacated the district court's order, but affirmed its finding that "plaintiff or his attorneys [Kramer among them] had either intentionally deceived the court, 'so as to be in a position to nullify any adverse judgment,' or had been reckless, and in either event had committed 'a flagrant violation' of Fed. R. Civ. P. 11."

(5) In Caplan v. Fairchild Publications Corp., 13 Media L. Rep. 1571, 1573, 1986 WL 10782 (E.D. Pa. 1986), aff'd 815 F.2d 693 and 815 F.2d 694 (3d Cir. 1987), the district court dismissed plaintiff's complaint in accordance with Federal Rule of Civil Procedure 37(b), finding that "the record establishes willful disobedience and bad faith on the part of plaintiff and his counsel," in providing discovery and failing to abide by the court's orders. The Court further found that "the imposition of attorney's fees incurred by defendant is not an effective deterrent," as that sanction had twice been imposed "with no apparent effect." Id.

(6) In Pearline Gregory v. Saks & Co., 1986 WL 10666, No. 85-1853, slip. op. (E.D. Pa. Sept. 25, 1986), the district court criticized Kramer for accusing defendants' witnesses of perjury in his summation, advising him at a sidebar colloquy with counsel, that "this is not the way we try a case in federal court."

(7) In In re E.F. Hutton Banking Practices Litigation, 663 F. Supp. 123, 125 (S.D.N.Y. 1987), the court dismissed a fraud/RICO complaint filed by Kramer, given "the absence of any colorable allegation of misrepresentation, omission or deceptive conduct of any kind."

(8) In Silverman v. Weil, 662 F. Supp. 1195, 1201 & n. 14 (D.D.C. 1987) aff'd without opinion, 839 F.2d 824 (D.C. Cir. 1988), the court dismissed another fraud/RICO complaint filed by Kramer after he had "been given four opportunities to draft an adequate complaint" and had repeatedly "made gross and misleading misrepresentations in various pleadings and statements to this Court."

(9) In Seiffert v. Green, 1987 WL 26670, Civ. No. 81-1956, slip op. (E.D. Pa. Dec. 8, 1987) the court both assessed attorney's fees and costs against Kramer and limited his client's proof at trial as sanctions for Kramer's "noncompliance with discovery requests and this Court's Order."

(10) Also in Seiffert v. Green, 1988 WL 2068, Civ. No. 81-1956, slip. Op. (E.D. Pa. Jan. 13, 1988), the

court noted that a fee application submitted by Kramer made statements "directly contradictory" to those he made in open court, concerning whether he had written a 20-page brief, and finding it "utterly incomprehensible" that it took Kramer 4.8 hours to prepare a "scratched out and pasted up brief" of 8 pages drawn from a boilerplate motion in another case.

(11) In Kravinsky v. Wolk, 1988 WL 84748, Civ. No. 86-4820, slip. Op. (E.D. Pa. Aug. 11, 1988), aff'd without opinion, 869 F.2d 589 (3d Cir. 1989), the court stated that Kramer's "failure to comply with orders and rules of this court," including his failure to attend a scheduled court appearance or offer any explanation for his absence, would fully justify imposing sanctions on him, but declined to impose sanctions given absence of proof that his client acquiesced in the wrongdoing.

(14) In Getaway Travel, Inc. v. City of Philadelphia, 1989 WL 24859, Civ. No. 88-3126, slip. op. (E.D. Pa. Mar. 15, 1989) the district court dismissed an antitrust action in which the court found that Kramer's client could not possibly succeed, where Kramer had asserted state law claims having "no basis in law."

(15) In Gray v. Home Shopping Network, Inc., 1989 WL 52439, Civ. No. 88-5159, slip. op. (E.D. Pa. May 17, 1989), the district court granted summary judgment against the plaintiff, represented by Kramer, because he offered only hearsay evidence in opposition to the motion. The court noted that "it is at least questionable whether the claim for punitive damages . . . could have been made in good faith."

(16) In Matthews v. Freedman, 128 F.R.D. 194, 202-04 (E.D. Pa. 1989), aff'd sub nom., Appeal of Kramer, 919 F.2d 135 (3d Cir. 1990), the district court reprimanded Kramer and ordered him to pay $9,404.53 in attorneys' fees for advancing "frivolous legal assertions." The court also referred the matter to the disciplinary review board of the Supreme Court of Pennsylvania for whatever action they deemed appropriate. In imposing sanctions and reprimanding Kramer, Judge Gawthrop stated that "[r]eview of public court orders and opinions reveals that attorney Kramer, individually or jointly with his clients, has been sanctioned on numerous occasions for violations of the Federal Rules, including Rule 11." (citations omitted).

(17) In Matthews v. Freedman, 882 F.2d 83 (3d Cir. 1989), the Third Circuit fined Kramer $250.00 for refusing to concede an appeal in light of a Supreme Court decision "patently dispositive of the issues." The Third Circuit stated further that "[t]he absence of a specific appellate rule comparable to Fed. R. Civ. P. 11 does not give counsel the privilege to file a frivolous appeal or maintain one after subsequent and binding precedent demonstrates that the appeal no longer has merit," and warned Kramer that it would "not hesitate to apply sanctions in a sequential manner" against him in the future.

(18) In Schwartz v. Hosp. of the Univ. of Pennsylvania, 1989 WL 64286, Civ. No. 88-4865 (E.D. Pa. June 12, 1989), the district court awarded the defendants attorneys' fees and costs based upon a finding that Kramer and his client had both "acted in bad faith" in attempting to renege on a settlement agreement.

(19) Again in the matter of Schwartz v. Hosp. of the Univ. of Pennsylvania, 1989 WL 80322, Civ. No. 88-4865 (E.D. Pa. July 18, 1989), the district court stated that "[t]he plaintiffs, along with Kramer, have unreasonably increased the cost of litigation in this matter." (20) In Cellar Door Productions, Inc. v. Kay, 897 F.2d 1375, 13779 & n. 3 (6th Cir.) cert. denied 498 U.S. 819, 111 S. Ct. 64, 112 L. Ed. 2d 38 (1990), the Sixth Circuit affirmed an award of attorneys' fees and costs for the failures of plaintiff's counsel, Kramer, to disclose the related prior action "in viola-

tion of the rules of this Court and the clear directives of the [filing] form."

(21) In Lightning Lube, Inc. v. Witco Corp., Civ. No. 87-3243, slip op., 9-11 (D.N.J. May 4, 1990), the Honorable Jerome B. Simandle, U.S.M.J. (now District Judge Simandle), sanctioned Kramer for obtaining "proprietary and confidential" information from Witco that he was under court order not to disclose, and then "violat[ing] the court's protective order" by leaking it to the press. Kramer was ordered to pay Witco's attorneys' fees and costs because of his "harassing misuse of discovery." The court noted that Kramer's actions were apparently "calculated to harass and harm Witco, with the hope of possibly coercing favorable settlement from Witco, based upon the prominent disclosure of confidential information," and that he had ignored explicit warnings from his adversaries to avoid such conduct.

(22) For a third time in the matter of Schwartz v. Hosp. of the Univ. of Pennsylvania, 1990 WL 198750, Civ. No. 88-4865 (E.D. Pa. Nov. 30, 1990), Kramer's clients were sanctioned and prohibited from introducing designated matters into evidence after repeated failures to respond to discovery.

(23) In a matter emerging from Flip Side Productions v. Jam Productions, 1991 WL 61467, Civ. No. 82 C 3684 (N.D. Ill. April 16, 1991), after Kramer's former clients, Flip Side, brought an action against him to pay in excess of $90,000.00 in Rule 11 sanctions for a frivolous RICO/antitrust suit, Kramer moved to

disqualify Flip Side's new attorney on the grounds that he supposedly represented Kramer as well. In denying the motion, the district court noted that the baseless motion was "somewhat bizarre" and "at best disingenuous."

(24) In the district court's decision on the merits of Flip Side's action against Kramer in Flip Side Productions v. Jam Productions, 1991 WL 277617, Civ. No. 82 C 3684 (N.D. Ill. Dec. 20, 1991), it found in Flip Side's favor and against Kramer, "as it is and always has been clear that Kramer was the principal architect of plaintiff's misguided efforts" to continue to pursue frivolous litigation.

(25) In Fineman v. Armstrong World Industries, Inc., 774 F. Supp. 266, 269, 274-75 & nn. 13-16 (D.N.J. 1991) aff'd in relevant part, 980 F.2d 171 (3d Cir. 1992), the district court noted that "Kramer's conduct throughout the course of this trial has led to the imposition of a restraining order, consideration of motions for mistrial, delays resulting therefrom, and more," and ultimately concluded that "that plaintiffs' counsel deliberately set out to sabotage Armstrong's defense in every way possible, without regard to rules of conduct, rules of law, and orders and directions from this Court."

This court also noted that:

"In a further, bizarre development which just came to the Court's attention, a circumstance which might even be considered humorous if presented in isola-

tion, the Court has learned that, since October 11, 1990, Mr. Kramer has been unauthorized to practice law in the State of New Jersey for failure to make his required contributions to the Client's Security Fund. Considered in the context of Mr. Kramer's other conduct in connection with this case, however, both inside and outside the courtroom, this development is but further evidence of Mr. Kramer's complete disregard for rules and procedures governing the propriety and civility of an attorney's conduct. Regretfully, his transgressions of this sort have not been limited to the present matter."

Id at 275. (citations omitted).

(26) Again in Lightning Lube, Inc. v. Witco Corp., Civ. No. 87-3243, slip op., 3-4 (D.N.J. June 19, 1991), Kramer was sanctioned, this time for writing to the Security [sic] Exchange Commission, in violation of Local Rule 36, with a prediction that Witco could suffer a $200+ million verdict. The Honorable Joseph H. Rodriguez, U.S.D.J., entered an order compelling Kramer to cease such conduct in order to "guarantee the defendant a fair trial by a panel of impartial jurors," observing that "[o]n two prior occasions Kramer was ordered by courts in this District to abide by Rule 36." Judge Rodriguez characterized Kramer's intolerable behavior as indicative of a "'settle or I will tell' philosophy" through actions which "reflect an intent to threaten and coerce a settlement and to disseminate to the public the amount of damages he claims will be recovered."

(27) In Kingsepp v. Wesleyan University, 142 F.R.D. 597, 600, 602 (S.D.N.Y. 1992), the district court disqualified Kramer from serving as class counsel given "his documented failures to comply with . . . court orders, statutory requirements, and the Federal Rules of Civil Procedure," and his pervasive misconduct in the case. The court stated that Kramer "is not an attorney to be entrusted to conduct the proposed litigation."

(28) For a third time in Lightning Lube, Inc. v. Witco Corp., 802 F. Supp. 1180 (D.N.J. 1992), Kramer's misconduct was at issue. In its motion for a new trial, Witco relied upon Kramer's improper conduct. Although this Court denied Witco's motion, there was not doubt in the Court's mind that Kramer had, in fact, approached witnesses in an attempt to improperly influence their testimony. Id. at 1201, n. 10.

(29) Also in Lightning Lube, Inc. v. Witco Corp., 144 F.R.D. 662, 668, 671 (D.N.J. 1992), this Court was faced with Lightning Lube's motion for attorney's fees and costs, filed by Kramer against Witco, for its allegedly unfounded assertion of a counterclaim. This Court denied Lightning Lube's motion in light of Kramer's own "pernicious" and "egregious misconduct" at trial.

(30) In Schwartz v. Steven Kramer and Associates, Civ. No. 90-4943 (E.D. Pa. Sept. 30, 1992), the district court denied Kramer's motion to dismiss his former client's malpractice action against him, finding that the complaint adequately stated a cause of

action against Kramer "arising from a purported fraudulent scheme to induce plaintiffs into settling litigation."

(31) In Vangarelli v. Witco Corp., 808 F. Supp. 387, 389-90 & n. 4 (D.N.J. 1992) the district court was forced to "direct its resources to deciding . . . a motion for recusal, when even a cursory investigation of the facts would have revealed the spuriousness of the allegations." Kramer claimed that former Governor Byrne, a member of defense counsel's firm, had appointed Judge Rodriguez to a commission, when, in fact, Judge Rodriguez had been appointed by another governor. In denying the motion, Judge Rodriguez noted that "this is not the first time Mr. Kramer has alleged that I have a conflict of interest, based on patently erroneous grounds."

(32) In In the Matter of Steven M. Kramer, 130 N.J. 536, 617 A.2d 663 (1993), Kramer was publicly reprimanded for "gross neglect," "failure to act with reasonable diligence," "failure to withdraw as counsel when discharged," and "failure to cooperate with the ethics authorities."

(33) Again, in Fineman v. Armstrong World Industries Inc., No. 84-3837, slip. op., 1993 WL 414752 (D.N.J. 1993), the Honorable John W. Bissell, U.S.D.J., condemned Kramer, holding that his "actions in contacting the press about a motion which was objectively baseless, before filing and service had been accomplished, on the eve of the annual meeting [of the defendant's stockholders], raises the

inescapable inference that he perverted the motion to harass [the defendant] and/or generate settlement leverage." Judge Bissell ordered a new trial and required co-counsel to be prepared to take over the entire case given the likelihood that during the retrial Kramer's "meddlesome, diversionary, malicious communications" with government and industry organizations, and his "improper remarks and attacks before the jury" would resume.

(34) In In the Matter of Steven M. Kramer, 193 A.D.2d 222, 602 N.Y.S.2d 831 (N.Y.A.D. 1st Dept. 1993), Kramer was censured for "acts of professional misconduct." The New York Court of Appeals stated that he "neglected a legal matter entrusted to him," "represent[ed] the client after he ha[d] been disqualified by court order," and "fail[ed] to cooperate with the disciplinary committee."

(35) In Lightning Lube v. Kramer, Civil Action No. 93-3878 (JHR), which has since been settled, the Honorable Jerome B. Simandle, U.S.D.J., entered an Order to Show Cause with Temporary Restraints against Kramer, on August 27, 1993, prohibiting him from forcing his former client, Lightning Lube, into involuntary bankruptcy. Judge Simandle's order also restrained Kramer from divulging any confidential information about his former client.

(36) Finally, on September 10, 1993, the United States Court of Appeals for the Third Circuit affirmed this Court's decision in the matter of Lightning Lube, Inc. v. Witco Corp., 802 F. Supp. 1180 (D.N.J. 1992),

aff'd 4 F.3d 1153, 1179 n. 15) (3d Cir. 1993). In its Opinion, the Third Circuit admonished Kramer for his unethical conduct at trial, stating:

> "We do not ignore the seriousness of Kramer's attempt to interfere with opposing witnesses. This conduct threatened to undermine the integrity of the trial proceedings and demonstrated a complete disregard of his obligations as an officer of the court."

Lightning Lube v. Witco, 4 F.3d at 1178. After deciding to uphold this Court's decision to deny the post-trial motion of Witco Corporation ("Witco") for a new trial on account of Kramer's improper conduct, the Third Circuit unequivocally warned Kramer that through his actions he risks having claims that he takes to court dismissed, whether there is prejudice or not, stating that:

> "In these circumstances, even though we do not think Witco was prejudiced by Kramer's conduct, it might well be that we should simply dismiss this action for reasons of deterrence and punishment. . . . [citations omitted]. But after most careful consideration, we have decided not to take that step because the remedy for misconduct should be decided by the district court and that court did not dismiss the case. The message which we do not wish to send is that misconduct which is not prejudicial may never lead to dismissal of a complaint or suppression of defenses."

Id. at 1179, n. 15."

Matthews v. Freedman (1989)

Respondent was reprimanded for violating Rule 11 of the Federal Rules of Civil Procedure, personally sanctioned under 28 U.S.C. § 1927 the amount of $9,404.53 for attorney's fees and costs and a copy of the Court's opinion forwarded to the Disciplinary Board of the Supreme Court of Pennsylvania for such further action, if any, the Board deems appropriate. 128 F.R.D. at 207-08. The Federal District Judge found that Respondent pursued an employment discrimination suit that was time-barred without an adequate legal basis or argument for a change in the law and after being informed by his adversary of the deficiencies. The Court found that Respondent "failed to make a reasonable inquiry into any of his clients' federal claims before filing the Complaint" 128 F.R.D. at 202 and that "Kramer acted in bad faith by pursuing the Title VII claims after he had received defendants' May 18 letter." 128 F.R.D. at 207. The referral to the Disciplinary Board was prompted by the Court's review of Respondent's then (1989) history of sanctions and violations of Federal rules. It listed 6 instances. 128 F.R.D. at 302. (All are included in Kramer v. Tribe, supra.) The District Court declined to suspend Respondent from practice before the Federal Court for the Eastern District of Pennsylvania, and opted instead to refer the matter to the Pennsylvania authorities. 128 F.R.D. 203-04.

We are not provided with any information about any discipline imposed by the Pennsylvania authorities.

Fineman v. Armstrong (1991)

One of the bases of granting the defendant Armstrong a new trial was the misconduct of Respondent as Plaintiff's

counsel: "This conduct, particularly the repeated appeals to sympathy, speculation and passion rather than reason, is undoubtedly what produced the jury's verdict." 774 F.Supp. at 269. According to United States District Judge Bissell, Respondent's counsel included Respondent "repeated by justif[ying] as to his own truthfulness and trust worthiness: although not a witness," 774 F. Supp. at 270, and, "most troubling" to the District court, making a "unadorned, disparaging attack upon defense counsel", id at 271. One "particularly egregious example of misconduct "was to infer that one defense counsel either counselled a witness to lie or engaged in sexual misconduct with a witness." 774 F.Supp. at 271. Respondent was warned about his conduct and given directions by the District Court, which he "repeatedly ignored." 774 F. Supp. at 271, n. 5.

Respondent's conduct during the trial led to the imposition of a restraining order and mistrial motions. 774 F. Supp. at 274. The District Court described Respondent's conduct as a "complete disregard for rules and procedures governing the propriety and civility of an attorney's conduct." 774 F.Supp. at 275. A footnote in the District Court's Opinion refers to other sanctions imposed and criticism prior to June, 1991 on Respondent: Matthew v. Freedman; Rubin v. Buckman, 727 F.2d 71 (3d Cir. 1984); and Schwartz v. Hospital of Univ. Penn, 1989 WL 64286 (E.D.Pa. 1989). 774 F. Supp. at 274, n. 16. It also points out that Respondent had been suspended in New Jersey for failing to make the required contributions to the Clients' Security Fund.

Seiffert v. Green (1987)

Respondent as Plaintiffs' counsel was personally sanctioned and ordered to pay the reasonable attorney's fees and costs incurred by the Defendants in moving to compel response to interrogatories. The United States Magistrate found

that "there has been no showing that Plaintiffs personally have contributed to the noncompliance 'with the Court's order'." Although the Magistrate assigned the fault for noncompliance to Respondent, he nevertheless sanctioned Plaintiffs by precluding them from utilizing information which would have been disclosed by compliance with the interrogatories and document request.

Kravinsky v. Wolk (1988)

Respondent represented Plaintiff on a RICO Complain which followed unsuccessful litigation against the Plaintiff in Pennsylvania's courts for non-payment of a judgment note given in the purchase and sale of a business which underlay both litigations.

Respondent after notification failed to appear at a pre-trial conference with the Court (he sent a substitute who did not represent the Plaintiff) and failed to comply with a pre-trial order. The District Court found (1988 WL 84748 at *2):

> "The clear indication is that plaintiff's counsel, recognizing the futility of proceeding to trial with this case, has abandoned the Plaintiff's counsel's failure to comply with orders and rules of this court would fully justify imposing sanctions against counsel. Obviously, however, in the absence of proof of acquiescence or joinder in such conduct by plaintiff, plaintiff should not be prejudiced by his counsel's failures. For this reason, this action is not being dismissed as a sanction or by reason of any failure on the part of plaintiff's counsel. The action is being dismissed because res judicata and collateral estoppel establish that plaintiff cannot prevail on any of his claims."

Vangarelli v. Witco (1992)

Respondent moved to disqualify Federal District Judge Rodriguez on what were described as "patently erroneous grounds", of which Respondent was made aware before the formal recusal motion was made. 808 F.Supp. at 389. No sanctions were imposed on Respondent.

Silverman v. Weil (1987)

Respondent represented the Plaintiffs, limited partners in a failed limited partnership which "was the victim of a fraudulent tax scheme concerned of and perpetrated by one of its general partners". 662 F.Supp. 1196. Plaintiffs' fourth complaint was dismissed with prejudice (662 F.Supp. at 1201):

> "Counsel for plaintiffs has been given four opportunities to draft and adequate complaint. In each instance, on clear notice of the insufficiency of their claims, he has failed to correct the problems. The Third Amended Complaint is still as seriously deficient, as the first three. Moreover, throughout these proceedings, plaintiffs' counsel has made gross and misleading misrepresentations in various pleadings and statement to this Court. [footnote omitted] These misstatements taken in conjunction with a demonstrated inability to file an adequate complaint compel the Court to dismiss the present complaint with prejudice."

No sanctions were imposed.

International Mining Co. ("IMO") v. Allen & Co. (1987)

Federal District Court Judge Sweet dismissed IMO's Complaint after repeated failures to provide adequate discovery. Respondent represented IMO. Judge Sweet found that Answers to Interrogatories were not signed or sworn to, both required by the Federal Rules (567 F.Supp. at 786) and that representations of its counsel in open court as to document production were not honored (567 F.Supp. at 788). Prior monetary sanctions had proved unavailing.

Although the precise role of Respondent in these discovery deficiencies is not detailed in the Opinion, it is fairly inferable from the Opinion that counsel played a role. In all events, Respondent did not in his defense to the present charges, proffer as an explanation that the client was solely at fault.

Caplan v. Fairchild Publications (1986)

Respondent represented the Plaintiff in this libel action. A senior federal judge dismissed the complaint and sanctioned the Plaintiff to pay Defendant's attorney in connection with the Motion to Dismiss. 1986 WL 10782 at *5.

It is, however, not clear Respondent was responsible for the Plaintiff's sanctionable conduct. While the Court raises the possibility of counsel's involvement with the Plaintiff, see at *2 and *3, the Court makes the following findings:

> "I find that the blatant discovery abuse which has occurred in this case is largely plaintiff's personal responsibility." (at *2)

Somewhat inconsistently, the Court also found: "I conclude that the record establishes willful disobedience and bad faith on the part of plaintiff and his counsel." (Id at *4)

While not totally free from doubt, we are not inclined to consider this case as an aggravating circumstance for the Respondent.

Hansel v. Shell (1996)

Claims of the Plaintiff represented by Respondent were dismissed as a sanction for failure to provide full and complete answers to interrogatories. No sanction was imposed on Respondent, nor any criticism directed toward him. Nothing in the reported opinion (which is all we have) would permit us to infer that Plaintiffs' conduct was that of the Respondent.

Getaway Travel v. Philadelphia (1989)

Respondent represented the Plaintiff in an anti-trust action arising from the denial of a lease at Philadelphia airport to Plaintiff.

Several complaints were filed. The court comments less than flatteringly on the draftsmanship. All of the complaints were dismissed because the "action cannot possibly succeed."

The District Court does not directly criticize the Respondent, nor are sanctions imposed.

In re E.F. Hutton (1987)

Respondent represented one of two plaintiffs who filed class action lawsuits against the former brokerage house E.F. Hutton following the latter's plea of guilty on May 2, 1985 to 2,000 counts of mail and wire fraud. Plaintiff's theory was different than that on which Hutton was prosecuted. The Federal District Judge found the theory insufficient and the complaints were dismissed. 663 F.Supp. at 125. While one could characterize the allegations as aggressive, there was no criticism of Respondent and no sanctions were imposed.

Astron Venture v. Nationwide Leasing (1989)

Respondent represented the Plaintiff. A defendants' verdict was rendered after trial. The opinion is the District Court's denial of Plaintiff's motion for new trial.

The District Court denied the motion finding it "lacks even semblance of merit" and that Plaintiff's "argument is fanciful, to put it kindly."

No direct criticism is made of Respondent. No sanctions were imposed.

The Appropriate Sanction

The Staff urges that Respondent be disbarred, citing In re Ghobashy, 185 A.D.2d 23, 592 N.Y.S. 2d 322 (1st Dept. 1993) cert. denied, 510 U.S. 1045 (1994); In re Friedman, 196 A.D.2d 280, 609 N.Y.S.2d 578 (1st Dept. 1994) cert. denied, 513 U.S. 820 (1994); In re Mason, 208 A.D.2d 1, 621 N.Y.S. 2d 582 (1st Dept. 1995); In re Kranis, 219 A.D.2d 278, 640 N.Y.S. 2d 523 (1st Dept. 1996); and In re Evangelista, 233 A.D.2d 1, 662 N.Y.S. 2d 48 (1st Dept. 1997). Respondent argues the sanction should be more than the six months imposed in New Jersey (Tr. 218).

Neither the Selby matter nor the DeLuca matter warrant disbarment either individually or collectively. The New Jersey Court before whom the DeLuca matter was litigated, imposed a six-month suspension. Judge Cote in Selby v. Arms imposed monetary sanctions on Respondent and from all that appears, did not refer the matter to the disciplinary processes of the Southern District of New York. Nevertheless, Judge Cote made findings that Respondent made at least four false assertions in his affidavit in opposition to the motion to dismiss.

More troubling is the lengthy list of matters in which Respondent has been sanctioned, criticized or admonished. Re-

spondent's conduct in Kramer v. Tribe, is the most serious. His tactics were most unprofessional. Frankly put, he used a lawsuit as a weapon in a battle for personal enrichment. Matthews v. Freedman involved Federal Rule 11 sanctions for pursuing a meritless law suit in bad faith. Fineman v. Armstrong involved the granting of a new trial based in part on Respondent's summation. Kravinsky v. Wolk involved a failure to appear at a pre-trial conference and sending a substitute. Vangarelli v. Witco involved a motion to disqualify a federal judge on "potentially erroneous grounds" of which Respondent was made aware before the application. As to the remainder, none appear as serious as those we have outlined; in some it is not possible to ascribe the misconduct to Respondent, as opposed to his client. Nevertheless, with the Selby and DeLuca matter, there are 38 reported instances during 11 years in which Respondent has been sanctioned, criticized, admonished either solely or with his client by over 50 different federal and state judges, by our count.

With such a history, we have very little discretion with respect to the sanction, given the Appellate Division's decision in In re Mason, 208 A.D.2d 1, 621 N.Y.S.2d 582 where disbarment was imposed upon sustaining 66 of 71 charges involving 20 clients over six years. Many of the charges in Mason involved neglect of matters, rather than in Respondent's case a litigation tactic which involves the intentional "pushing of the envelope" with respect to compliance with discovery obligations. It may be "chicken shit" to Respondent, but the civil and criminal administration of justice, as we currently know it depends upon counsel complying with discovery demands. If we are wrong as to the meaning of Mason, the Appellate Division can correct us.

Were we writing on a clean slate, we would be more lenient to Respondent. We would be inclined to suspend Re-

spondent for three years with special conditions. It is not unreasonable to assume that in view of his history, Respondent for three years with special conditions. It is not unreasonable to assume that in view of his history, Respondent has not been given the benefit of any "close calls" of which all litigators have been, and hope to continue to be, the beneficiary. Certainly, the cases cited to us other than Mason involved false testimony which we have not found here. We ascribe the falsity of Respondent's assertions more to carelessness than to venality, more to a practice of perceived certainty than to deliberate falseness. Selby is a perfect example. Respondent asserted facts (the completion of certain depositions) with reckless disregard. He is correct that it is the height of foolishness to represent the completion of a deposition when the contrary is so readily provable. But represent it he did. His belief that it was not intentionally false probably led to Respondent's passing the polygraph exam.

But putting aside our non-professional psychological analyses, the fact remains that Respondent has engaged in a pattern of disruptive and serious misconduct, has little, if any, remorse, and if we were to credit the judicial officers in the underlying 38 episodes, Respondent could well have been guilty of multiple violations of DR 1-102(a)(4) [engaging in conduct involving misrepresentations], DR1-102(a)(5) [engaging in conduct that is prejudicial to the administration of justice], DR 1-102(a)(8) [engaging in conduct that adversely reflects on a lawyer's fitness to practice law], DR 70-102(a)(1) knowingly filing a lawsuit that will merely serve to harass or maliciously injure another] and DR 7-102(a)(7) [knowingly advancing a claim that is unwarranted under existing law].

Since our charge is merely to make a recommendation as to a sanction, we reluctantly recommend that Respondent be disbarred.

Respectfully submitted,

May 15, 1998

/s/_____
Otto G. Obermaier, Esq.
Chair, Hearing Panel X

APPENDIX D.

LAWYERS WEEKLY USA, November 4, 1996

Solo Sues Law Firms for Tobacco Cover-Up

Alleges Lawyers Conspired to Hide Health Risks

The Right Man for the Job?

Kramer's 'Rambo' Style Draws Ethics Complaints

> "The findings were for chick-shit stuff," he says. "Charles Barkley has 120 technical fouls and ejections in his career and he's still a premier player. Sanctions are like getting thrown out of a game, it's part of playing tough."